



DEPARTMENT OF HEALTH & HUMAN SERVICES

5-11.4

Office of the
General Counsel

Region VI
1200 Main Tower Building
Dallas, Texas 75202

December 8, 1988

H. C. Townsley, M.D.
Area Director
Oklahoma City Area Indian Health Service
215 Dean A. McGee St.
Room 409
Oklahoma City, Oklahoma 73102

DEC 12 1988

U.S. DEPT. OF HEALTH & HUMAN SERVICES

Re: Your request for opinion - Randolph-Sheppard Act
Amendments of 1974, Public Laws 93-516, 93-651 and
Indian Self-Determination Act, Public Law 93-638.

Dear Dr. Townsley:

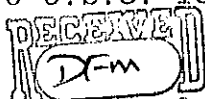
We respond to your request for an opinion concerning the two above-referenced laws. The issue you present is whether one of these two statutes should take precedence, or if they can be reconciled. You state that questions have arisen concerning the operation of vending machines in facilities operated by Indian tribes under the Indian Self-Determination Act, Public Law 93-638. You ask specifically whether the provisions of the Randolph-Sheppard Act (Act), Pub. L. 93-651, apply to Indian tribally-owned and operated property under Public Law 93-638. You also ask whether the Indian tribe can contract for the operation of a vending facility in federally-owned property, operated by the tribe under a Pub. L. 93-638 contract, in lieu of a Randolph-Sheppard facility. The Randolph-Sheppard Act provides for vending facilities for the blind in federal buildings.

You did not state a specific fact situation which has arisen leading to these questions. While we cannot address general questions without the specific factual background, we have the following observations.

For the reasons stated below, it is our opinion that the provisions of the Randolph-Sheppard Act do not apply to property which is tribally-owned and operated pursuant to the Indian Self-Determination Act. Further, it is our belief that an Indian tribe may as part of its Pub. L. 93-638 authority contract for such vending services within the contract period.

Discussion

The provisions of the Randolph-Sheppard Act provide for the operation of vending stands for the blind in federal buildings. 20 U.S.C. 107. This statute was originally enacted on June 20,



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1936. It states:

107. Operation of vending facilities authorized; preferences regulations: justification for limitation on such operations.

(a) For the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any Federal property.

(b) In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency as provided in this chapter.

* * * * *

107e. Definitions

As used in this chapter-

* * * * *

(3) "Federal property" means any building, land, or other real property owned, leased, or occupied by any department, agency, or instrumentality of the United States (including the Department of Defense and the United States Postal Service), or any other instrumentality wholly owned by the United States, or by any department or agency of the District of Columbia or any territory or possession of the United States;

(4) "Secretary" means the Secretary of Health, Education, and Welfare; ^{1/}

(5) "State" means a State, territory, possession, Puerto Rico, or the District of Columbia;

^{1/} The Department of Health, Education and Welfare, became, of course, the Department of Health and Human Services on April 1, 1980. 20 U.S.C. 3508(a).

(6) "United States" includes the several States, territories, and possessions of the United States, Puerto Rico, and the District of Columbia ***.

20 U.S.C. 107, 107e, as amended (1988) (emphasis added).

The Secretary of Health and Human Services is directed by the Act to prescribe regulations in authorizing the operation of vending facilities on federal property, giving priority to blind persons licensed by a state agency, unless placement of or operation of such a vending facility would adversely affect the interests of the United States. That determination is to be made by the Secretary and is to be "binding on any department, agency or instrumentality of the United States affected by such determination." Id.

Public Law 93-638 directs that such authorities as are to be exercised by the Secretary of Health and Human Services may be contracted to an Indian tribe at the request of that tribe:

The Secretary of Health and Human Services is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to carry out any or all of his functions, authorities and responsibilities [pursuant to 42 U.S.C.A. 2001 et seq.].

25 U.S.C. 450g(a).

The Secretary of Health and Human Services has contracted with the tribe at its request, and the tribe is exercising the authorities of the Secretary in carrying out such functions and responsibilities on its property pursuant to the provisions of the regulations:

*** It is the policy of the Secretary to facilitate the efforts of Indian tribes to plan, conduct, and administer programs, or portions thereof, which the Indian Health Service is authorized to administer for the benefit of Indians.

* * * * *

Contracting is one of several mechanisms by which Indian tribes can exercise their right to plan, conduct, and administer programs or portions thereof which the Secretary is authorized to administer for the benefit of Indians. ***

(b) The regulations of this subpart are applicable to contracts awarded pursuant to section 103 of Pub. L. 93-638, 25 U.S.C. 450g to carry out any or all of the functions, authorities, and responsibilities of the secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended, 42 U.S.C. 2001 et seq.

42 C.F.R. 36.201(a)(3),(6),(b).

Since these vending facilities are on property "tribally-owned and operated under Public Law 93-638" (emphasis ours), they are not located "on federal property," as the Act requires. The tribe owns the property and the vending machines. Hence, the property is not federal property. As a result, the provisions of the Act do not apply.

In answer to your second question, an Indian tribe may as part of its operation of federally-owned property pursuant to Public Law 93-638 operate a vending facility. Generally, the fact that the property is federally-owned does not mean necessarily that any vending facility on that property must be a Randolph-Sheppard facility. The property may be federally-owned, but if it is being operated pursuant to Public Law 93-638, the tribe is "exercis[ing] its right to plan, conduct, and administer programs or portions thereof" in the same manner as if it was being operated by the Secretary. 42 C.F.R. 36.201(a)(6). The question thus becomes whether the tribe as the legal possessor of the property may contract with a third party for placement of the vending facility on that property. The tribe, as any other contractor, is free to bargain for any contract and any contractual provision. The regulations implementing the Indian Self-Determination Act provide that contracts under that Act shall be in accordance with 41 C.F.R., Chapters 1 and 3. 42 C.F.R. 36.215. Other pertinent regulations further provide, however, that if the contractual provisions conflict with 41 C.F.R. Chapters 1 and 3, "the provisions of this subpart will govern." 48 C.F.R. PHS 380.401. The regulations also provide that the Secretary waives certain standard federal contract clauses which are normally included in the General provisions of a contract to the extent that they are omitted from the General provisions section of contracts under this subpart. 48 C.F.R. PHS 380.402. These general provisions are listed in the regulations in full text. 48 C.F.R. PHS 350.280-4; 380.411. Furthermore, the Secretary may waive for the purpose of a specific contract other provisions of Federal contracting laws or regulations as determined not appropriate in view of, or are inconsistent with, the provisions of this Act. *Id.* Therefore, we believe that an Indian tribe may contract for such services during the effective period of the contract because any

requirement that normally would provide for such facilities in a contract could be waived, and because the property is not federal property within the meaning of the Act.

Conclusion

It is our opinion that property which is tribally-owned and operated is not federal property, within the meaning of the Randolph-Sheppard Act, and the provisions of the Act thus do not apply to such tribal property. It is further our opinion that federally-owned property being used by an Indian tribe pursuant to Public Law 93-638 is subject to its use by the tribe in the same manner as if it were the owner of that property, and that therefore the provisions of the Act do not apply.

If you have further questions, or added information is needed, please do not hesitate to contact us at FTS 729-3465.

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